Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STANLEY JERMAIN WALKER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Eighth District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1.) Whether Petitioner's right to confrontation and effective cross-examination, under the Sixth Amendment to the United States Constitution was violated by the exclusion of evidence that the named complainant in this murder prosecution had been recently arrested for possession of a prohibited weapon, a 9 mm Colt, in light of the Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth District of Texas.

OPINIONS AND ORDERS DELIVERED BELOW

The October 5, 2000 opinion, not reported, of the Court of Appeals, Eighth District of Texas, affirming the trial court's judgment of conviction is attached and reprinted at App. 1-11.

The March 21, 2001 order, not reported, of the Texas Court of Criminal Appeals denying Stanley Walker's Petition for discretionary review is attached and reprinted at App. 12.

The order of the Court of Appeals, Eighth District of Texas, seeking Stanley Walker's Motion to Stay Mandate, not reported, is pending decision. Petitioner's motion to stay mandate is reprinted at App. 13-16.

JURISDICTION OF THIS COURT

This petition for writ of certiorari seeks review of the October 5, 2000 decision of the Court of Appeals, Eighth District of Texas.

Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C.A., and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime has been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor and to have the Assistance of Counsel for his defence.

Tex. R. App. P. 44.2 provides:

(a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Tex. Rules of Evidence, Rule 401 provides:

"Relevant evidence" means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.

STATEMENT OF THE CASE

The Evidence

On the 11th day of December, 1994, in Northeast El Paso, Texas, and near the 10300 block of Newport Street, a group of individuals attended a party. During the course of the evening, and into the morning of December 11, 1994, and shortly after midnight, an argument ensued between Albert "Kiki" Gandara and Bear Barley. These two individuals began mutual combat by fighting one another. There is conflicting testimony on what happened during their fight. Albert's brother, Joe Gandara, joined the fight to assist his brother after Bear slammed Joe to the ground. During the fight, others also joined in, but, again, the testimony is not consistent as to the precise nature of the occurrence. A friend of the Gandara brothers, Mark Herrera pulled out a screwdriver and used it as a deadly weapon. Further, a friend of the Gandara brothers, Tommy Madrid fired his 38-caliber weapon into the area of the fight.

According to the State's witnesses, Petitioner allegedly fired a 22-caliber weapon which resulted in the death of Joe Gandara and which resulted in non-fatal wounds to Albert "Kiki" Gandara. The police obtained two statements from the accused, the first of which was completely exculpatory (State's Exhibit 59), and the second of which (State's Exhibit 60) stated that Petitioner

fired a weapon to defend his (then girlfriend) wife, Shannon Walker.

Petitioner proffered his objections, legal argument and the nature of the evidence excluded by the trial court (rr4-p76-94)[1] (rr4-p90). Petitioner preserved error at the trial level: rr2-p155-156, 238-242; rr3-p3-12, 21, 47, 82-100, 122-123; rr4-76-94. Petitioner sought to defend the case by impeaching the testimony of Hortencia Gardea, Victor Garcia and Albert Gandara. *Id.* and cr-84. These three named witnesses testified, in summary, that the complainant, Joe Gandara was: a helpful person who took care of his little brother, his young blood; who didn't need a weapon; a nice person who looked after his kids and "who never hurt nobody," who always took care of his friends and told others to go straight to school, and who would not use weapons because he knew martial arts. *Id.* Petitioner believed he was required to confront, cross-examine and impeach this evidence, particularly because Petitioner vigorously disputed the statements and opinions given by these three witnesses.

Petitioner proffered controverting evidence through Officer Adrian Fonseca to show Petitioner's reasonable apprehension in relation to the defense of his wife, and to show that the deceased and his brother were the initial aggressors. Petitioner's purpose in offering Officer Fonseca's testimony was not to prove the complainant's character, but rather to prove the complainant's intent and motive to cause his wife harm on the night in question; to

---

[1] That on August 6, 1994, Jose Gandara was stopped by the police and found to be in possession of a 9mm handgun, Colt Commander, that was within his arm's length.

directly impeach the witnesses' testimony; and to correct a false impression left with the jury. Thus, the evidence of Joe Gandara carrying a firearm within five months of the incident had relevance beyond its tendency to demonstrate the complainant's character. A reasonable jury could have believed this evidence shed light upon Joe Gandara's and Albert Gandara's state of mind[2] at the time of the incident on the night in question, and, as long as it was otherwise admissible, Petitioner possessed the right to present it for the jury's consideration. The proffered evidence tended to make the existence of a consequential fact more probable. Rule 401 of the Texas Rules of Evidence. Petitioner argues that he demonstrates harm, (see T.R.A.P., Rule 44.2.) by the trial court's exclusion of the evidence. In other words, this fact that Albert Gandara was in possession of the 9mm Colt was probative of his state of mind, his brother's state of mind, and possibly indicated a motive or demonstration of intent behind the confrontation that evening. In sum, the proffered testimony was probative of whether he and his brother were, in fact, the aggressor(s) and admissible for "other purposes" besides demonstrating character and actions in conformity therewith. See Tex. R. Evid. 404(b). Therefore, Petitioner contends that the Eighth Court of Appeals erred in upholding the trial court's decision to exclude the evidence.

As trial counsel for the defense correctly pointed out to the trial court, the above exception is applicable in this

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[2] Albert Gandara was aware that his brother was arrested for possession of the 9mm handgun on August 6, 1994. rr4-p122-123.

case. On examination, three witnesses indicated that Joe Gandara was the sort of person who did not carry a weapon, did not need a weapon and would not initiate a fight, *supra*. These statements easily could have conveyed to the jury the impression that the complainant was an exemplary citizen who had never been in trouble with the police before, or was not the sort of person who would start a fight or carry a weapon, and it opened the door for impeachment by Petitioner of the proffered testimony. Accordingly, Petitioner argues that he was entitled to expose the falsity of these representations by showing that the complainant had been arrested and found in possession of the 9mm Colt. Petitioner maintains that his right to confront his accusers was violated to such an extent that certiorari is proper in the instant case.

At trial and on appeal, Petitioner argued that he was denied the right to effectively confront and cross-examine his accusers by the trial court's disallowance of Officer Adrian Fonseca's testimony that Joe Gandara possessed the 9mm Colt in August of 1994. This fact directly contradicted the testimony and representations made by Hortencia Gardea, Victor Garcia and Albert Gandara. Petitioner contends that this error of constitutional magnitude (Sixth and Fourteenth Amendments) was not harmless, and should result in new trial.

REASONS FOR GRANTING THE WRIT

The Texas Eighth Court of Appeals has decided an important question of federal law in a way that conflicts

with relevant decisions of the United States Supreme Court.

ARGUMENT AND AUTHORITIES

1. Whether Petitioner's right to confrontation and effective cross-examination, under the Sixth Amendment to the United States Constitution was violated by the exclusion of evidence that the named complainant in this murder prosecution had been recently arrested for possession of a prohibited weapon, a 9mm Colt, in light of the Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)?

In the instant case, Petitioner argues that the trial court committed reversible error in failing to allow the defense to bring before the jury the subject of the 9mm Colt through Officer Fonseca's testimony, described above. The Supreme Court has jurisdiction over Petitioner's Confrontation Clause claim. He expressly argued the claim in his brief to the Texas Court of Appeals and Texas Court of Criminal Appeals. See, *Williamson v. United States*, 512 U.S. 594 (1994); and, *Lee v. Illinois*, 476 U.S. 530 (1985). The exclusion of Petitioner's evidence and proffer violated Petitioner's Confrontation Clause rights. Adhering to the Court's general custom of allowing state courts initially to assess the effect of erroneously excluded evidence in light of substantive state criminal law, the Texas courts are to consider in the first instance whether this *Sixth Amendment* violation was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24. P. 21 (1967); see also, *Ohio v. Roberts*, 448 U.S.

56, 66. Pp. 4-21 (1980). The Confrontation Clause ensures the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding, *Maryland v. Craig*, 497 U.S. 836, 845 (1990), as by cross-examination of a declarant, see *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

The right of confrontation has ancient roots. *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959). Over two thousand years ago the Roman Governor Porcius Festus reported to King Agrippa: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." *Coy v. Iowa*, 487 U.S. 1012, 1015-1016, 108 S. Ct. 2798, 2800, 101 L. Ed. 2d 857 (1988) (quoting Acts 25:16). See also, 5 Wigmore on Evidence (3d ed. 1940) Sec. 1364 (origin of right to confront witnesses).

The right of confrontation was also recognized in English common law. *Salinger v. United States*, 272 U.S. 542, 548 47 S. Ct. 173, 175, 71 L. Ed. 398 (1926). See also, Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384-388 (1959) (describing confrontation of witnesses in England). Initially, the right of the accused to confront witnesses was recognized in trials for treason. Wigmore, at 123. Arguably, the most notorious treason trial in England was that of the Sir Walter Raleigh, accused of conspiring to overthrow the King of England. See, F. Heller, The Sixth Amendment to the Constitution, 104 (1968). See also, Pollitt, at 388. Raleigh was charged with treason after a third party, Cobham, confessed under torture, to conspiring with Raleigh. At trial, Raleigh was denied the opportunity to confront

Cobham and Cobham's statement was used to convict and ultimately execute Raleigh. Pollitt, at 388-389. It was common during these times for an accused to be tried upon written "evidence which consisted solely of ex parte affidavits and depositions." *California v. Green*, 399 U.S. 149, 156, 90 S. Ct. 1930, 1934, 26 L. Ed. 2d 489 (1970); *Dowdell v. United States*, 221 U.S. 325, 330, 31 S. Ct. 590, 592, 55 L. Ed. 753 (1911) (Purpose of confrontation clause was to exclude accusation by written deposition.); *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S. Ct. 337, 339, 39 L. Ed. 409 (1895) (Confrontation provision enacted to prevent accusation of crime by written deposition at trial.). By the seventeenth century the right to confront witnesses had grown in favor. *Coy v. Iowa*, 487 U.S. 1012, 1015-16, 108 S. Ct. 2798, 2800, 101 L. Ed. 2d 857 (1988). See also, 5 J. Wigmore, Evidence Section 1395, p. 122 (3d ed. 1940). In *Duke of Dorset v. Girdler* (1720), Finch's Prec. Ch. 531, the right of confrontation was recognized as being fundamental to a fair trial: "The other side ought not be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering the truth." Wigmore, at 123. (Internal quotations omitted.)

Although the right of confrontation had gained wide acceptance in England, it was not originally recognized in the United States Constitution. *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866). See also, Freely, Malcom M., The Oxford Companion to the Supreme Court of the United States, p. 935 (1992). Its recognition did not occur until the ratification of the Sixth Amendment. U.S. Const., Amend. VI. See, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 590, 100 S. Ct. 2814, 2834-2835, 65 L. Ed. 2d 973

(1980) (Brennan, J., concurring); *California v. Green*, 399 U.S. at 175, 90 S. Ct. at 1943 (Harlan, J., concurring); *Barracota v. United States*, 45 F. Supp. 38, 38 (S.D.N.Y. 1942). The United States Supreme Court has since held the right to confrontation is "one of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." n.3 *Kirby v. United States*, 174 U.S. 47, 55-56, 19 S. Ct. 574, 577, 43 L. Ed. 890 (1899). Indeed, the right of confrontation helps to establish a criminal justice system "in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 2062, 90 L. Ed. 2d 514 (1986). The right of confrontation was extended to State criminal proceedings through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 407, 85 S. Ct. 1065, 1070, 13 L. Ed. 2d 923 (1965).

The right to confront one's accuser necessarily includes the right to cross-examine. As the Supreme Court held in *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974): "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Id.*, 415 U.S. 308, 315-316, 94 S. Ct. 1105, 1110 (1974) (quoting 5 J. Wigmore,

Evidence Section 1395, p. 123 (3d ed. 1940)). (Emphasis in original.) See also, *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S. Ct. 1074, 1077, 13 L. Ed. 2d 934 (1965) (Jurors were entitled to make informed judgment as to the weight to assign to witness' testimony.); and, *Smith v. Illinois*, 390 U.S. 129, 132, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956 (1968) (citing *Alford v. United States*, 282 U.S. 687, 692-694, 51 S. Ct. 218, 219-220, 75 L. Ed. 624 (1931) ("Prejudice ensues from a denial of the opportunity to . . . put the weight of [the witness'] testimony and his credibility to the test, without which the jury cannot fairly appraise them.") In short, confrontation is the check and balance that ensures fairness in our adversary system of justice, and cross-examination is the essential means by which opponents test evidence proffered against them. *Davis*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

Cross-examination serves three general purposes: cross-examination may serve to identify the witness with his community so that independent testimony may be sought and offered concerning the witness' reputation for veracity in that community; cross-examination allows the jury to assess the credibility of the witness; and, cross-examination allows facts to be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. *Alford v. United States*, 282 U.S. 687, 691-92, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931) (citing *Tla-koo-yel-lee v. United States*, 167 U.S. 274, 17 S. Ct. 855, 42 L. Ed. 166 (1897)). Cross-examination is by nature exploratory and there is no general requirement that the defendant indicate the purpose of his inquiry. *Ibid.* Indeed, the defendant should be granted a wide

latitude even though he is unable to state what facts he expects to prove through his cross-examination. *Ibid.*

The Constitutional right of confrontation is violated when appropriate cross-examination is limited. The scope of appropriate cross-examination is necessarily broad. A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify.

Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.

Nevertheless, there are several areas where cross-examination may be inappropriate and, in those situations the trial judge has the discretion to limit cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 682, 106 S. Ct. 1431, 1436-1437, 89 L. Ed. 2d 674 (1986). Specifically, a trial judge may limit cross-examination when a subject is exhausted, or when the cross-examination is designed to annoy, harass, or humiliate, or when the cross-examination might endanger the personal safety of the witness. See generally, *Van Arsdall*, 475 U.S. at 679, 106 S. Ct. at 1435 (Trial judge may exercise discretion to prevent harassment, prejudice, confusion of the issues, the witness' safety, and repetitive or marginally relevant interrogation.); *Smith*, 390 U.S. at 132-134, 88 S. Ct. at

750-751; and, *Alford*, supra. See also, Tex. R. Crim. Evid. 608, 609, 404 and 405.

In the instant case, Petitioner moved for reversal at the Texas Eighth Court of Appeals based upon denial of confrontation and effective cross-examination:

> ISSUE NO. FIVE:
>
> THE TRIAL COURT ERRED IN DISALLOWING THE DEFENSE TO EFFECTIVELY CONFRONT AND CROSS-EXAMINE HIS ACCUSERS.
>
> Appellant adopts the record citations, *supra*, issue three and four, in support of this issue. In short, Appellant argues that he was denied the right to effectively confront and cross-examine his accusers by the trial court's disallowance of Officer Adrian Fonseca's testimony that Joe Gandara possessed the 9mm Colt in August of 1994. This fact directly contradicted the testimony and representations made by Hortencia Gardea, Victor Garcia and Albert Gandara. Appellant contends that the trial court committed error similar to *Carroll* error. And that this error was of constitutional magnitude (6th and 14th Amendments), not harmless, and should result in new trial.
>
> The defendant is to be provided an opportunity to effectively cross-examine and impeach the State's witnesses adverse to the defense, and to adduce testimony which contradicts the State's case in chief (compulsory process). This right is founded in the common law, and the 6th and 14th Amendment rights, and their Texas counterparts under Article I, Section 10 and 19 of the Texas Constitution. The right to expose potential

> bias or motive on the part of the testifying witness is essential to a fair trial. Further, cross examination is probably the most effective method known throughout civilization and law to expose bias, motive, error, inaccuracy, exaggeration, and fault within the witness' testimony. *Carroll v. State*, 916 S.W.2d 494 (Crim. App. 1996); and *Amunson v. State*, 928 S.W.2d 601 (San Antonio 1996). In the instant case, Appellant argues that the trial court committed reversible error in failing to allow the defense to bring before the jury the subject of the 9mm Colt through Officer Fonseca's testimony. For this reason, Appellant moves for new trial.

In support of his petition for discretionary review with the Texas Court of Criminal Appeals, Petitioner argued:

> *Argument and Authority*
>
> Petitioner cited the Court to *Tate v. State*, 981 S.W.2d 189 (Crim. App. 1998) in support of the proposition that he was improperly denied his right to effectively impeach and cross-examine the State's case. The Court held, in part, that since trial counsel could argue the facts excluded by the trial court that Petitioner was not harmed. Petitioner argues that *Tate*, cited, does not stand for that proposition. Argument is not evidence. Petitioner contends that he was harmed because the trial court excluded the evidence as described in Petitioner's brief, and as discussed by the intermediary court. Opinion, pages 6-9; Petitioner's brief, issues 3-5.
>
> Petitioner argues that it does not follow, upon a denial of the right to cross-examine and

> impeach the State's case, that because trial counsel was allowed to argue something that was not in evidence, by the trial court's exclusion, that he suffered no harm. It is axiomatic that argument does not replace evidence before the jury. For these reasons, Petitioner moves that his petition be granted. Petitioner was harmed because the trial court excluded impeachment evidence. Had this evidence been admitted through Officer Fonseca, Petitioner submits that he would have prevailed in the case.
>
> The testimony was not cumulative, for the admission of the evidence through the arresting officer would not be cumulative of the scant evidence admitted through the lay witness. For the above reasons, Petitioner respectfully moves that his petition be granted.

The rationale for no reversible error was that trial counsel for the defense was allowed to argue before the jury some of the matters of the excluded evidence. App. 1, pp. 8-9. Petitioner reiterates that *argument*, which is not *evidence*, cannot replace excluded evidence in violation of Petitioners Sixth Amendment right to confront and cross-examine the State's case.

CONCLUSION

The Petitioner respectfully requests that his Petition for Certiorari be granted and that the judgment of the Court of Appeals, Eighth District of Texas be reversed, and that the case be remanded for new trial.

Respectfully submitted,

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(LOGO)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STANLEY JERMAIN WALKER, Appellant, v. THE STATE OF TEXAS, Appellee.	No. 08-98-00297-CR Appeal from the 384th District Court of El Paso County, Texas (TC# 76948)

OPINION

This is an appeal from a jury verdict finding Appellant, Stanley Jermain Walker, guilty of murder and attempted murder. We affirm.

I. SUMMARY OF THE EVIDENCE[1]

On December 10, 1994, Appellant was at a party with his girlfriend, Shannon Steinhoff.[2] As he was leaving the party, Steinhoff called out to him. When he reached the area where Steinhoff was, he saw a "Mexican guy" with a knife fighting with his friend, Bear. The guy told Bear, "one on one," and Bear said, "okay." The guy put the

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[1] Appellant gave two statements to the police regarding the events on the night of December 10, 1994. The summary is taken from these statements.

[2] Appellant and Steinhoff have since married.

knife in his back pocket and the two started fighting. Bear was "whipping" on the guy, picked him up, and slammed him to the ground. Bear slipped and fell on the ground. The other guy then pulled out the knife and was going towards Bear. Steinhoff was right behind Bear and it appeared to Appellant that she was going to be stabbed. Appellant panicked, took out a .22-caliber gun, and fired "about five" shots at the guy with the knife. Appellant told police later he "shot the guy because I knew in my heart that he was going to stab Shannon."

Appellant was indicted for the murder of Jose Gandara ("Joe") (Count I) and the attempted murder of Alberto Gandara ("Kiki") (Count II). Appellant was sentenced to fifteen years' confinement on the murder charge and ten years' confinement on the attempted murder charge. The trial court sentenced Appellant in accordance with the jury's verdict.

II. DISCUSSION

Appellant presents five issues on appeal. We will address Issue Two first, as it raises a factual sufficiency point. Next, we will address Issue One, in which Appellant complains of error in the jury charge. Finally, we will address Issues Three through Five, which involve alleged error in the exclusion of testimony.

Factual Sufficiency Issue

In reviewing factual sufficiency, we consider all of the evidence, but we do not view it in the light most favorable to the verdict. *See Clewis v. State*, 922 S.W.2d

126, 129 (Tex.Crim.App.1996); *Levario v. State*, 964 S.W.2d 290, 295 (Tex.App. – El Paso 1997, no pet.). We will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Levario*, 964 S.W.2d at 295. In conducting a factual sufficiency review, the reviewing court cannot substitute its conclusions for those of the jury. *See id.* It is not within the province of this Court to interfere with the jury's resolution of conflicts in the evidence or to pass on the weight or credibility of the witness's testimony. *See Levario*, 964 S.W.2d at 295. Where there is conflicting evidence, the jury's verdict on such matters is generally regarded as conclusive. *See id.*

In Issue Two, Appellant asserts that the evidence was factually insufficient to support the finding of guilt. Specifically, Appellant contends the State did not prove that the cause of death was by a .22-caliber round fired from his weapon. Appellant also argues "there was no evidence in relation to the specific round that struck Albert Gandara" and thus the evidence is insufficient to support the conviction for attempted murder. The State notes, and we agree, that because Appellant has challenged only the factual sufficiency of the evidence, he has conceded that the evidence was legally sufficient to support the convictions. *See Clewis*, 922 S.W.2d at 133.

In his statement to police, Appellant stated that he "took out a .22, black with brown grips, gun that I had in my pants, I took about five shot [sic] at the guy with the knife." Bear Barley testified that Appellant told him that he "shot that guy last night." Victor Garcia testified that he heard two different guns being fired. Tommy Madrid testified that he fired two warning shots in the air with

his .38-caliber revolver. Officer James Holmes testified that as a part of the crime scene unit, he took photographs, processed the crime scene, and collected evidence from the autopsy. Officer Holmes stated that he recovered two .22-caliber bullet fragments while at the autopsy. He admitted that he could tell the bullets were .22-caliber slugs, but he could not testify from what weapon they were fired. Dr. Juan Contin, the Chief Medical Examiner for El Paso County, testified that Joe was shot in the groin and in the chest. He determined the chest wound to be the fatal wound.

Steinhoff testified that she heard "numerous guns" and "it sounded like it was just coming at you every different direction." Simon Sampson testified that he saw someone hanging out of a passenger window of a white four-door Regal shooting at the victim. He stated that he heard two shots coming from the passenger's side of the car. Andrew Sampson testified that he heard four or five shots coming from a brown Impala, but he did not see who fired the shots. Anna Rider testified that she heard "a lot of shots" and only saw one person with a gun. He was an Hispanic male across the street from the party and she stated that he fired a couple of shots. Rider also "heard a couple of other gunshots." Ronnie Kirby testified that he saw someone running from the direction of the shots. Kirby "guessed" it was an Hispanic male and he saw what looked like a gun in his hand. Orlando Hairstone testified that he too saw what he believed to be an Hispanic male with something that "looked like the shape of a gun" in his hand running from the direction of the shots.

Finally, Kiki testified that he heard shooting and when he looked back to see where the shooting was coming from, he saw Appellant. He stated that Appellant was "shooting his gun wildly." Kiki testified that he saw a gentleman in the middle of the street with a firearm, but that person was not firing in his direction. He stated that at that angle, it would have been difficult for the individual to hit him. When asked if Appellant was the man who shot him, Kiki answered "yes."

In reviewing all of the evidence, but not in the light most favorable to the verdict, we find the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We believe the jury could have concluded that Appellant's .22-caliber handgun and Madrid's .38-caliber revolver were the only two guns fired. Since the testimony showed that Joe was killed by a .22-caliber bullet, the jury could have concluded that it came from Appellant's gun. And because the evidence was that Madrid did not fire his gun in the direction of the fight, the jury could have concluded that it was Appellant who shot Kiki. The jury heard testimony from numerous witnesses and it was the jury's function to resolve any conflicts in the evidence and weigh the credibility of the witnesses' testimony. We cannot substitute our conclusions for those of the jury. The verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We overrule Issue Two.

Jury Charge Issue

In Issue One, Appellant contends the trial court erred in placing a duty to retreat in relation to the defense of

others. Specifically, Appellant argues that the trial court imposed a more onerous duty than is required by law, in that the court commingled self-defense with the defense of others. Trial counsel objected to the charge, stating the following:

> Your Honor, the defense is going to object to the charge specifically on page 9, 10, 11, 15 and 16, in those paragraphs, where it requires us, in defense of a third person, for the actor, that being Stanley Walker, to have to the obligation to determine whether or not the third person has the duty to retreat.
>
> I know that's what the law is, but I don't think the law is right. I don't think we should be having to establish that in order to get a defense of a third person. We would object to inclusion of that requirement in any of those paragraphs on page 9, 10, 11, 15 and 16.

Section 9.32 of the Texas Penal Code provides that a person is justified in using deadly force against another if a reasonable person in the actor's situation would not have retreated. *See* Tex.Pen.Code Ann. § 9.32(a)(2) (Vernon Supp.2000). Section 9.33 of the Texas Penal Code provides that a person is justified in using deadly force against another to protect a third person if, under the circumstances as the accused reasonably believes them to be, the accused would be justified in using deadly force to protect himself against the unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect, and the accused reasonably believes his intervention is immediately necessary to protect the third person. *See* Tex.Pen.Code Ann. § 9.33 (Vernon 1994).

The only duty to retreat found in Section 9.33 is placed upon the person being protected. *See Hughes v. State*, 719 S.W.2d 560, 564 (Tex.Crim.App.1986). In *Hughes*, the Court noted:

> So long as the accused reasonably believes that the third person would be justified in using deadly force to protect himself, the accused may step in and exercise deadly force on behalf of that person. Part of what goes into the assessment of whether the third person had a right to exercise deadly force in defense of himself is whether or not a reasonable person in his position would have retreated instead. Thus, in deciding intervention is necessary, the accused must reasonably believe that 'a reasonable person in [the third person's] situation would *not* have retreated.'
>
> The jury would correctly be instructed, then, that to find the conduct of the accused to have been justified as defense of a third person, *inter alia*, it must believe, or have a reasonable doubt whether the accused, from his standpoint, reasonably believed that a reasonable person in the third person's situation would not have retreated.

Hughes, 719 S.W.2d at 564.

The court's charge correctly applied the law with regard to defense of a third person. The jury was instructed that for Appellant's actions to be justified, he would have to reasonably believe that under the circumstances then existing, a reasonable person in Steinhoff's situation would not have retreated before using deadly force in her own defense. This is the proper charge under Section 9.33 and the trial court did not err in placing a

duty to retreat in relation to the defense of others. Issue One is overruled.

Evidentiary Issues

The trial court has broad discretion in determining the admissibility of evidence, and we should not reverse absent a clear abuse of discretion. *See Allridge v. State*, 850 S.W.2d 471, 492 (Tex.Crim.App.1991), *cert. denied*, 510 U.S. 831, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993); *Chavarria v. State*, 876 S.W.2d 388, 391 (Tex.App. – El Paso 1994, no pet.). A trial court's ruling will be sustained on appeal if it is correct on any theory of law applicable to the case, even if the trial court gives the wrong reason for the decision, and this is especially true with regard to admission of evidence. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990).

In Issues Three through Five, Appellant essentially argues that the trial court erred in excluding the testimony of Officer Adrian Fonseca regarding Joe Gandara's arrest for unlawfully carrying a weapon to impeach the testimony of Hortencia Gardea, Victor Garcia, and Kiki Gandara regarding Joe's character for being a good person.[3] Appellant was allowed to introduce evidence of

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[3] In Issue Three, Appellant contends that the trial court erred in disallowing the defense to make inquiry about the complainant's having carried/possessed a weapon. In Issue Four, Appellant asserts that the trial court erred in disallowing the defense to correct a false impression with the jury. In Issue Five, Appellant argues that the trial court erred in disallowing the defense to effectively confront and cross-examine his accusers.

Joe's arrest from Kiki. After Kiki testified for the State, defense counsel, pursuant to the motion in limine, informed the court that he wanted to ask Kiki about Joe's use of firearms. The trial court decided to allow defense counsel to question Kiki about Joe's arrest for unlawfully carrying a weapon, to rebut the statements of Gardea that Joe "was peaceable, a good man, loving father. . . . " Kiki was asked whether Joe carried weapons and he responded, "No." When asked again whether his brother carried weapons, the following exchange occurred:

Defense Counsel:	You may answer that question, sir. Did your brother carry weapons?
Alberto Gandara:	No, he didn't carry weapons.
Defense Counsel:	Did you know that he was arrested by the El Paso Police Department on the 6th of August, 1994 for carrying a nine-millimeter pistol? Did you know that, sir?
Alberto Gandara:	Yeah, I knew – I knew that.
Defense Counsel:	I guess at least once he carried a weapon.
Alberto Gandara:	It was – there was more than one person in the car.
Defense Counsel:	They charged him with it, though, didn't they?
Alberto Gandara:	I don't know what happened on that.
Defense Counsel:	Whose car was it?

Alberto Gandara: My brother's car.

Defense Counsel: Did they find it in the glove compartment, sir?

Alberto Gandara: No.

Since evidence of Joe's arrest was elicited from Kiki, the officer's testimony would have been cumulative. *See* Tex.R.Evid. 403. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."); *Mosley v. State*, 983 S.W.2d 249, 258 (Tex.Crim.App.1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 550 (1999) (finding that the admission of evidence similar to what the appellant wished to offer may mitigate the harm he would have otherwise suffered.). We also note that during closing arguments, defense counsel argued that Joe had been arrested for carrying a nine-millimeter pistol four months prior to the current incident and suggested that the arrest "goes directly to contradict Mr. Garcia over there, who told you that Joe Gandara was so tough that he didn't need a weapon. He didn't use weapons. Wouldn't need them, he was so tough." He also stated that such evidence controverted Gardea's testimony that Joe "would never do anything like this, that he was a good guy, that he was a family man, that he went out of his way to prevent fights." The trial court did not abuse its discretion in excluding Officer Fonseca's testimony. We overrule Issues

Three through Five. Having overruled all of Appellant's issues, we affirm the judgment of the trial court.

DAVID WELLINGTON CHEW,
Justice

October 5, 2000

Before Panel No. 1
Larsen, McClure, and Chew, JJ.

(Do Not Publish)

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS ON TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

March 21, 2001
COA#: 08-98-00297-CR
RE: Case No. 2099-00
STYLE: WALKER, STANLEY JERMAIN

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

MATTHEW DEKOATZ
1108 N CAMPBELL
EL PASO TX 79902

NO. 08-98-00297-CR

IN THE

COURT OF APPEALS

EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

STANLEY WALKER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

MOTION TO STAY MANDATE

Motion To Stay Mandate

To the Honorable Justices of the Eighth Court of Appeals. Comes now Appellant and respectfully files and urges this motion to stay mandate of the Court's decision affirming the decision below. In support of same, Appellant would show:

I.

Appellant makes this motion pursuant to **Rule 18.2 of T.R.A.P.**

II.

Appellant shall, and is in the process of filing, file a petition for writ of certiorari with the United States Supreme Court.

A. The circumstances surrounding the writ focus upon an alleged denial of confrontation; to wit:

ISSUE NO. FIVE:
THE TRIAL COURT ERRED IN DISALLOWING THE DEFENSE TO EFFECTIVELY CONFRONT AND CROSS-EXAMINE HIS ACCUSERS.

Appellant adopts the record citations, *supra*, issue three and four, in support of this issue. In short, Appellant argues that he was denied the right to effectively confront and cross-examine his accusers by the trial court's disallowance of Officer Adrian Fonseca's testimony that Joe Gandara possessed the 9 mm Colt in August of 1994. This fact directly contradicted the testimony and representations made by Hortencia Gardea, Victor Garcia and Albert Gandara. Appellant contends that the trial court committed error similar to *Carroll* error. And that this error was of constitutional magnitude (6th and 14th Amendments), not harmless, and should result in new trial.

The defendant is to be provided an opportunity to effectively cross-examine and impeach the State's witnesses adverse to the defense, and to adduce testimony which contradicts the State's case in chief (compulsory process). This right is founded in the common law, and the 6th and 14th Amendment rights, and their Texas counterparts under Article I, Section 10 and 19 of the Texas Constitution. The right to expose potential bias or motive on the part of the testifying witness is essential to a fair trial. Further, cross examination is probably the most effective method known throughout civilization and law to expose bias, motive, error, inaccuracy, exaggeration, and fault within the witness' testimony. *Carroll v. State*, 916 S.W.2d 494 (Crim. App. 1996); and *Amunson v. State*, 928 S.W.2d

> 601 (San Antonio 1996). In the instant case, Appellant argues that the trial court committed reversible error in failing to allow the defense to bring before the jury the subject of the 9mm Colt through Officer Fonseca's testimony. For this reason, Appellant moves for new trial.

These grounds were stated in Appellant's brief and his petition for discretionary review.

III.

Appellant maintains that to disallow the requested stay would work a serious hardship upon him and that, in light of his Sixth Amendment claim, that there are substantial grounds to pursue relief through the Supreme Court of the United States.

Conclusion: Appellant thanks the Court for and for review of this motion.

Prayer for Relief: Wherefore, Appellant prays that the Honorable Eighth Court of Appeals grant the requested relief and order a stay of the mandate pending review by the United States Supreme Court.

Respectfully Submitted,
For Appellant

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ACKNOWLEDGMENT OF SERVICE

Undersigned counsel hereby acknowledges that on this 17th day of April, 2001, a copy of the above motion for rehearing was served via hand delivery on/to Mr. Jaime Esparza, District Attorney of the 34th Judicial District by and through his Appellate Division at 500 East San Antonio, 9th floor, El Paso, Texas 79901

/s/ _____ 4/17/01
M. "MATEO" DEKOATZ, counsel for Appellant